Supreme Court, U.S.
FILED
MAR 2 1994
OFFICE OF THE CLERK

No. 92-1920

In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
PETITIONER

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Counsel for Petitioner

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Counsel for Respondent

**Counsel of Record*

PETITION FOR CERTIORARI FILED JUNE 3, 1993
CERTIORARI GRANTED JANUARY 21, 1994

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2/16/90	1	COMPLAINT
3/6/90	5	ANSWER by Defendant Lloyd W. Aubry, Jr.
3/30/90	6	MOTION by Defendant Lloyd W. Aubry, Jr. for joinder
3/30/90	8	DECLARATION of H. Thomas Cadell re motion for joinder
4/16/90	9	MOTION by Plaintiff Karen Livadas for summary judgment
4/16/90	13	AFFIDAVIT (and Exhibits A-B) of Karen Livadas regarding motion for summary judgment
4/30/90	17	MOTION by Defendant Lloyd W. Aubry, Jr. for summary judgment
4/30/90	18	MEMORANDUM by Defendant Lloyd W. Aubry, Jr. in support of motion for summary judgment
5/2/90	22	ORDER by Judge Thelton E. Henderson denying motion for joinder
5/15/90	27	ORDER by Judge Thelton E. Henderson denying motion for summary judgment
6/27/90	34	ORDER by Judge Thelton E. Henderson granting plaintiff's motion for reconsideration, counsel to refile summary judgment motions
10/12/90	47	JUDGMENT: entered in favor of plaintiff by Judge Thelton E. Henderson
11/6/90	53	NOTICE OF APPEAL by Defendant Lloyd W. Aubry, Jr. from Dist. Court decision
11/9/90	63	DECLARATION of James H. Curry in support of motion for stay pending appeal by Defendant
11/15/90	64	ORDER staying injunction and judgment pending appeal by Judge Thelton E. Henderson

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

11/27/90	Joint Motion for Expedited Appeal Filed
12/19/90	Order Granting Joint Motion for Expedited Appeal
1/11/91	Appellant's Opening Brief Filed
2/22/91	Appellant's Reply Brief Filed
9/11/91	Opinion and Order of the Court of Appeals for the Ninth Circuit
9/25/91	Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc Filed
4/29/92	Order Directing Response to Petition for Rehearing
3/8/93	Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc; Amended Opinion of the Court of Appeals for the Ninth Circuit.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KAREN LIVADAS,
PLAINTIFF,

v.

LLOYD AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
DEFENDANT

DECLARATION OF H. THOMAS CADELL IN SUPPORT OF MOTION TO JOIN ADDITIONAL PARTY DEFENDANTS
Filed March 30, 1990

I, H. Thomas Cadell, Jr., declare:

1. I am an attorney duly licensed to practice before the courts of the State of California and the U.S. District Court, Northern District of California and attorney for the defendant, LLOYD AUBRY, JR., Labor Commissioner, in the above-entitled action.

* * *

6. Attached hereto as Exhibit A is a copy of the collective bargaining agreement provided by Plaintiff's counsel to the undersigned entitled "Food Store Contract, March 1, 1989-February 29, 1992, United Food & Commercial Workers Union, Local 373, AFL-CIO, Solano and Napa Counties" (hereinafter, the "CBA") which is the applicable agreement governing the employment of Plaintiff LIVADAS by Safeway Stores, Inc.

* * *

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on March 29, 1990, at San Francisco, California.

/s/ H. Thomas Cadell, Jr.
H. THOMAS CADELL, JR.

EXCERPTS FROM EXHIBIT A TO CADELL DECLARATION

FOOD STORE CONTRACT MARCH 1, 1989—FEBRUARY 29, 1992

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 373, AFL-CIO

1.3.7 CONTRACT COVERAGE AND ENFORCEMENT:

* * *

In the event the Employer fails to observe the terms of this section in any respect, the Union shall notify the Employer in writing of such violation and it shall be corrected. Following such notice if the Employer again, within six (6) months, violates the terms hereof and it is so determined by the Adjustment Board or Arbitrator, then in such event, such Employer shall no longer be entitled to a non-food or general merchandise clerk classification, and the food clerk rates shall thereafter become applicable to all non-food or general merchandise work in the Employer's store where the violation occurred.

3.1 ***

PROBATION: There shall be a probationary period of sixty (60) calendar days for all employees. During the probationary period, a probationer may be discharged without right of appeal . . .

3.2 TERMINATION: Except for reasons beyond the Employer's control, regular employees who work on three (3) days per week or more shall be given three (3) working days notice of layoff, dismissal or discharge, or the equivalent pay, except when such termination has been for cause, such as insubordination, disorderly or improper conduct, under circumstances requiring immediate termination. Employees who work on two (2) days per week shall be given two (2) working days notice under like conditions. In all such cases the day on which such notice is given shall not be counted

unless a notice is given before the day's work begins. (A regular employee is one who has been in the continuous employ of the Employer for a period of ninety (90) days or longer).

3.3 WORK PERFORMANCE: The Employer shall have the right to discharge any employee for just cause. If the employee feels that he has been unjustly discharged, he shall have the right of appeal in writing to the Adjustment Board through action of the Union within ten (10) business days after the date of said discharge.

4.2 CLASSIFICATIONS: Seniority shall be by classification listed as follows in Section 1.3 and 9 hereof.

1. Managing Clerks
2. Senior Head Clerks and Senior Produce Clerks
3. Head Clerks
4. Journeyman and Apprentice Clerks
5. Floor Clerks, Non-Food and General Merchandise Clerks
6. Courtesy Clerks—subject to the restrictions of Section 9.1.5.4. hereof. Seniority of Courtesy Clerks shall be on a store-by-store basis, except that Courtesy Clerks transferred to another location will carry Courtesy Clerk seniority with them to the new location.

   In the event that an Apprentice Clerk who had previously served as a Courtesy Clerk is going to be laid off before the completion of the first 520 hours of the apprentice progression then in that event the Apprentice Clerk may step back temporarily into the Courtesy Clerk classification at the store in which they are currently working until recalled.
7. Employees employed in classifications covered by addendum agreements shall be deemed separate classifications.

   [The detailed contractual definitions of the eight classifications listed herein are contained at Section 9 *et. seq.* omitted from this Joint Appendix.]

4.10 PART-TIME EMPLOYEES:

4.10.1 Request for full-time work: Part-time Journeymen Clerks may bid for full-time forty (40) hour job openings or part-time job openings with more hours [with certain exclusions omitted]

4.10.2 Request for additional hours: Part-time employees may request additional available hours within their classification on a store-by-store basis provided they have the previously mentioned qualifications, are available for the hours, and have notified their store manager, in writing, of their desire for more hours and they shall be afforded such hours by seniority.

4.10.4 Reduction in hours and layoff: Reduction in part-time employees' hours, due to lack of work, shall be accomplished by seniority and by classification on a store-by-store basis. When layoffs occur due to lack of work, the last employee hired in the classification shall be the first to be laid off.

4.10.5 Wage Claims: It is understood that employees will not be able to claim wages under this interpretation, except for hours lost commencing with the weekly schedule immediately following the Union's written notification to the Employer of the claim and thereafter until resolved. If the employee or the Union gives written notice to the Employer within seven (7) days of his notice of layoff, the above provisions do not apply.

5.7 PAY DAY AND DEDUCTIONS: Employees shall be paid at least once each week within five (5) days after the termination of the week's work and before his shift terminates on pay day except in extenuating circumstances and any holiday week when the above period shall be increased to six (6) days. The Employer shall furnish each employee with a weekly wage statement showing his name, hours of work, overtime if any, total wages paid and list of deductions made.

5.15.2 FULL-TIME FUNERAL LEAVE: When a regular full-time employee on the active payroll is absent from work for the purpose of arranging for or attending the funeral of a

member of his immediate family as defined below, the Employer shall pay him for eight (8) hours at his regular rate of pay for each day of such absence up to a maximum of three (3) days, provided:

1. The employee notified the Employer of the purpose of his absence on the first day of such absence;
2. The day of absence is one of the three days commencing with the day of such death or the day immediately following the day of such death;
3. The absence occurs on the day during which the employee would have worked but for the absence;
4. The day of absence is not later than the day of such funeral except where substantial travel time is required;
5. The employee, when requested, furnishes proof satisfactory to the Employer of the death, his relationship to the deceased, the date of the funeral, and the Employee's actual attendance at such funeral.

For the purpose of subsection 5.15.1 and 5.15.2, a member of the immediate family means the Employee's spouse, child, mother, father, sister, brother, mother-in-law, father-in-law, grandparents and grandchildren.

6.1 BASIC WORK DAY AND WEEK: Forty (40) hours consisting of five (5) days of eight (8) hours each in a calendar week, Sunday through Saturday, shall constitute a week's work as provided in this entire section. Employees other than those scheduled to work six (6) days in a week shall receive two (2) days off, not necessarily consecutive, in each calendar week. A day's work shall consist of eight (8) hours within nine (9) consecutive hours with one (1) full uninterrupted hour off for a meal.

* * *

A work week consisting of four (4) ten (10) hour days may be implemented by mutual agreement of the parties.

Holiday Work Week: For all full-time employees, thirty-two (32) hours, consisting of four (4) eight (8) hour days, exclusive of the holiday shall constitute a week's work in any week in which a holiday falls. Even if scheduled to work thirty-two (32) hours during the week of a holiday, part-time employees holiday pay shall be prorated in accordance with Section 10.1.6.

Work shall not be performed without pay prior to the beginning of the scheduled working day. Work may be performed at the end of the working day in completing service to a customer which commenced prior to the end of the working day. It is understood that the checking of produce or shelf prices shall be considered as time worked.

6.2 OVERTIME AND PREMIUM WAGE RATES: The overtime and premium wage rates of pay shall be as follows:

TIME-AND-ONE-HALF THE STRAIGHT-TIME HOURLY RATE:

1. Work in excess of eight (8) hours per day.
2. Work in excess of forty (40) hours per week.
3. Work on the sixth (6th) day worked in a calendar week.
4. Work on the fifth (5th) and sixth (6th) day worked in a week containing one of the holidays named in this agreement not including the holiday worked.
5. Work performed after the fifth (5th) consecutive day worked without reference to the calendar week by a normal five-day employee until consecutive days are broken by a day off except when the schedule of an employee who has had or who is to have two (2) consecutive days off is changed in accordance with this agreement.
6. Work performed after the sixth (6th) consecutive day worked without reference to the calendar week by a normal six-day employee until consecutive days are broken by a day off, except when the schedule is being changed in accordance with this agreement.

7. Work performed by a full-time employee called in to work on a scheduled day off and given shorter notice than required by the agreement, but if such an employee works six (6) days during that calendar week, work performed on the scheduled day off shall be paid for at the employee's straight-time rate for that day and that on the sixth (6th) day worked shall be paid for at the overtime rate.
8. Work performed within ten (10) hours from the time the last shift ended.
9. Work performed where a meal period is not afforded in conformity with Section 7.5.
10. Work performed on Sunday following date of ratification.

DOUBLE THE STRAIGHT-TIME HOURLY RATE:

1. Work in excess of eight (8) hours on the sixth (6th) day worked in a calendar week.
2. Work performed on Sunday which is a day in excess of five (5) consecutive days by a scheduled five-day employee except when the schedule of said employee who has had or is to have two (2) consecutive days off is changed in accordance with this agreement.
3. Work performed on the seventh (7th) day in a calendar week.
4. Effective December 31, 1988, work performed on a holiday named in this Agreement (in addition to holiday pay) regardless of which day of the week the holiday falls.

DOUBLE TIME AND ONE-QUARTER THE STRAIGHT-TIME HOURLY RATE:

1. Work in excess of eight (8) hours on a Sunday following date of ratification.

DOUBLE TIME AND ONE-HALF THE STRAIGHT-TIME HOURLY RATE:

1. Work performed by a full-time employee on Sunday when Sunday was a scheduled day off and the employee was given shorter notice than that required by the agreement but if such an employee works (6) days during that calendar week, work performed on that Sunday shall be paid at the rate of time-and-one-half (1-1/2) the straight-time hourly rate and that on the sixth (6th) day worked, shall be paid for at the applicable overtime rate following date of ratification.

2. Work performed on Sunday which is in excess of six (6) consecutive days by a six-day employee.

TRIPLE THE STRAIGHT-TIME HOURLY RATE:

1. Work in excess of eight (8) hours on a holiday named in this Agreement.

* * *

6.4 SCHEDULED WORK: Whenever an employee's schedule is not changed in accordance with the provisions of this agreement and he is worked outside such schedule, then the hours so worked shall be paid for in accordance with the overtime provisions of this Agreement.

7.2. SHIFT INTERVAL: Except in bona fide emergencies, the minimum time off between shifts shall be ten (10) hours and employees called to work sooner than ten (10) hours from the end of their last work period shall be paid time and one-half (1½) the employee's straight time rate for all work performed up to the time said ten (10) hour period between shifts shall have elapsed.

7.5 MEAL PERIOD: Each employee shall be released from work for his meal period within five (5) hours, but no sooner than three (3) hours of the time of his reporting to work. Any employee who is given a meal period prior to three (3) hours into his shift or works in excess of five (5) hours without a meal period shall receive time and one-half (1½) for hours worked between the meal period and the completion of the third (3rd) hour or time and one-half (1½) for hours worked in excess of five (5) hours until a meal period is given.

In accordance with State law, a six (6) hour shift may be worked without a lunch period by mutual agreement of the parties.

7.7 DAILY GUARANTEE: Any full time employee (one who is normally scheduled to work forty (40) hours or more per week) who is ordered to report for work shall be guaranteed not less than eight (8) hours' work. Any part-time employees except students and courtesy clerks who are ordered to report for work shall be guaranteed not less than four (4) hours' work. Bona fide students, who, by reason of attending scheduled classes, may not work four (4) hours, may be individually excepted from this provision by written agreement of the Employer, the Union and the employee involved.

7.8 NIGHT PREMIUM: All employees shall receive extra compensation in addition to the regular scale herein set forth of fifty cents (50¢) per hour for all work performed between the hours of 7 p.m. and 7 a.m. Courtesy clerks shall receive fifty cents (50¢) per hour for work performed after 9 p.m.

9.8 TRANSFER OR REMOVAL OF WORK:

* * *

9.8.1.1 Any employee losing hours of employment by reason of such transfer or removal of work shall either be compensated at his regular rate of pay for such hours, or he shall be given other comparable employment by the Employer in the area covered by this Agreement at compensation equal to that received by him prior to the work transfer. If the comparable employment is within the bargaining unit then he shall retain his seniority and other benefits under the contract.

10.1 The following days shall be recognized as paid holidays: Employee's Birthday, New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Veteran's Day, Thanksgiving Day and Christmas Day.

It is understood that the day of observance for Washington's Birthday, Memorial Day and Veteran's Day shall be those dates established by federal statute.

10.1.2. WORK: In the event that employees shall be obligated to work on any of the open holidays, they shall be paid at the rate of double their straight-time rate of pay in addition to the normal holiday pay.

* * *

10.1.3 PROBATIONARY EMPLOYEES: Probationary employees are not entitled to any paid holidays.

11.1 All employees who work four (4) hours or more per week who have been in the service of the Employer for one (1) year, twelve (12) consecutive months, shall be granted a minimum of two (2) weeks' vacation annually with pay. Such employees who have been in the service of the Employer for five (5) years or more shall receive three (3) weeks' vacation annually with pay. Such employees who have been in the service of the Employer for fifteen (15) years or more shall receive four (4) weeks' vacation annually with pay. Such employees who have been in the service of the Employer for twenty (20) years or more shall receive five (5) weeks' vacation annually with pay.

11.2 ACCUMULATION: Vacations may not be waived, nor may extra pay be received by any employee for work performed for the Employer during the employee's vacation period. Vacations may not be cumulative from year to year.

11.3 CONTINUITY: All loss from employment because of reasonable absence from work through sickness or other emergencies, or temporary layoff, not exceeding thirty (30) calendar days, shall be considered as time worked for the purpose of determining the length of employment.

11.4 PAY AND SPECIAL PROVISIONS: For the purpose of computing or prorating vacation earnings, four percent (4%) of the employee's earnings for the previous year equal two (2) weeks' vacation pay; six percent (6%) of the employee's earnings for the previous year equal three (3) weeks' vacation pay; eight percent (8%) of the employee's earnings for the previous year equal four (4) weeks' vacation pay; and ten percent (10%)

of the employee's earnings for the previous year equal five (5) weeks' vacation pay.

* * *

11.5 FUND: The parties by the execution of this collective bargaining agreement, agree to accept and be fully bound by the terms of the Northern California Retail Clerks Unions-Employers Vacation Fund and Plan, and any amendments thereto.

18.1 For the purpose of this Agreement, a grievance is a dispute, difference of opinion between the parties, and grievances of employees involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement, including the arbitrability of all such matters. All grievances as defined are to be processed in accordance with the terms of this section.

18.2 DISCIPLINARY GRIEVANCES: Pursuant to Section 3 of this Agreement, any employee who feels he has been unjustly discharged or suspended shall file a grievance with the Union and thereafter within ten (10) business days of notice of the disciplinary action, the Union, if it desires to proceed with the grievance, shall notify the Employer or its Representative that an Adjustment Board shall be convened to hear the grievance. Within twenty (20) business days (Monday-Friday, holidays excluded) thereafter, the Union and the Employer shall meet as a Board of Adjustment, consisting of two (2) representatives of the Employer and two (2) representatives of the Union in an effort to settle the matter. The convening of the Adjustment Board may be waived or this time limit may be extended by mutual agreement of the parties. If the matter is not adjusted and is impassed, the Union, if it so elects, within twenty (20) business days following the meeting of the Board of Adjustment shall proceed to arbitration. If the Employer fails to meet with the Union within the time limits herein specified, the grievance will be deemed substantiated and the employee shall be made whole. If the Union fails to

comply with the time limits herein specified, such failure shall be deemed to be a conclusive waiver of the grievance.

* * *

The following panel of arbitrators will be assigned by lot to each Union in the Retail Clerks Bay Area Joint Council for a six-month (6) period: Barbara Chvany, David C. Nevins, Professor Paul D. Staudohar, Donald Wollett and Dr. Joseph W. Garbarino.

* * *

18.3 INTERPRETATION OR APPLICATION DISPUTES: Disputes as to the interpretation or application of the agreement shall be taken up by the party asserting it with the other party within twenty (20) business days of the date the asserting party has knowledge thereof. Said grievance shall be in writing, specifying in detail the basis for the dispute, including the applicable section(s) of the Agreement involved, to the best knowledge of the asserting party.

The parties shall have fifteen (15) business days in which to process and amicably adjust the dispute. By mutual agreement of the parties, the time periods provided herein may be extended. [Procedure for arbitration utilizing panel of arbitrators set out in Section 18.2 omitted.]

* * *

18.5 The award of the arbitrator or the Adjustment Board shall be final and binding on the Employer, the Union and the Employee(s). All jointly incurred arbitration expenses shall be borne by the losing party. In the event of a dispute concerning the application of this Section, the arbitrator shall be empowered to determine the allocation of expenses.

18.6 The arbitrator shall not have the right to alter, amend, delete, or add to any of the terms of this Agreement.

18.7 Interest at seven percent (7%) shall be payable on all money claims awarded by the Adjustment Board or by an Arbitrator, and such interest shall commence as of the date the complaint is first submitted to the Adjustment Board or when the parties meet to amicably adjust the dispute, whichever is applicable.

18.8 CLAIMS: In the case of a direct wage claim or a claim for contributions to employee benefit plans which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claim for settlement to either the grievance procedure provided for herein or to any other tribunal or agency which is authorized and empowered to effect such a settlement.

The Employer is not required to pay any wage claim or portion thereof retroactively for a period of more than six (6) months immediately prior to the date of the Employer's receipt, or written notice from the Union, of such claim.

A.3 BONUS ELIGIBILITY:

Each employee on the payroll on April 30, 1989, excluding Apprentice Food Clerks*, but including Journeymen Food Clerks hired subsequent to April 30, 1989, shall be eligible for a bonus determined on the following basis: [detailed contractual formula for measuring bonuses omitted.]

AFFIDAVIT OF KAREN LIVADAS
Filed April 16, 1990
[Caption Omitted in Printing]

I, KAREN LIVADAS, swear and affirm:

1. I am a member of Local 373, United Food and Commercial Workers, AFL-CIO.

2. I was terminated from my job with Safeway Stores in Solano County, California, on January 2, 1990.

3. On January 2, 1990, I went to my manager at Safeway Stores and requested all pay due me at the date of my termination, including vacation pay and hours worked during the previous week. My manager told me that he did not have any payroll records at the store and that he could not provide me with any pay at the time. My manager informed me that Safeway would mail a check to my house.

4. Safeway Stores did not pay me due and payable wages until January 5, 1990.

5. Neither Local 373, nor Safeway Stores, nor I dispute the amount of my final wage payment. My final wage payment of $2,112.49 included the correct amount of vacation pay due to me, as well as the correct number of hours I worked paid at the correct wage rate. This amount is calculated as follows:

128.5 days vacation pay at $13.78/hour
24 hours in previous week at $13.78/hour
Plus $.50/hour shift differential.

Neither Local 373, nor Safeway, nor I have initiated a grievance under the applicable collective bargaining agreement concerning the amount of my final wage payment, because all parties are in agreement that the amount of this payment was correctly calculated under the collective bargaining agreement covering my job. My dispute is that this wage payment was made three days after it was due under California law.

6. The collective bargaining agreement between Local 373 and Safeway Stores does not make any provision concerning

the timeliness of wage payments to employees who are discharged. This collective bargaining agreement is attached as Exhibit A to this affidavit [omitted].

7. I attempted to file a claim for wages and penalties due from Safeway on January 3 and 8, 1990, at the Napa office of the California Division of Labor Standards Enforcement (DLSE). On both occasions, DLSE officers inquired as to whether I was in a union, and told me that the DLSE cannot handle my claim as long as I am a union member.

8. On January 9, 1990, I was finally permitted to file a claim form with the DLSE. This claim was dismissed on February 7, 1990, through a letter to me from J. Aceves, Deputy Labor Commissioner. This letter is attached to this affidavit as Exhibit B.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 10th day of April, 1990, at Vallejo, California.

/s/ Karen Livadas
KAREN LIVADAS

EXHIBIT B
TO AFFIDAVIT OF KAREN LIVADAS

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
3273 CLAREMONT WAY, ROOM 206
NAPA, CA 94558
Phone (707) 257-0660

February 7, 1990

Karen Livadas
40 Parkhaven Court
Vallejo, CA 94591

Re: Livadas vs Safeway Stores, Inc.
Case No. 16-2072

Dear Ms. Livadas:

This letter is in response to the wage matter you recently filed against Safeway Stores claiming a penalty pursuant to Labor Code Section 203 in that you did not receive payment of your final wages on the day of discharge.

It is our understanding that the employees working for Safeway are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.

Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

Therefore, we are unable to proceed on your claim for penalties and are closing our file. We are sorry we could not be of further assistance to you.

Very truly yours,

/s/ J. Aceves
J. ACEVES
Deputy Labor Commissioner

STATE OF CALIFORNIA — DEPARTMENT OF INDU... RELATIONS
DIVISION OF LABOR STANDARDS ENFC...EMENT
STATE LABOR COMMISSIONER

INITIAL REPORT OR CLAIM

PLEASE PRINT ALL INFORMATION

FOR OFFICE USE ONLY			
T...BY	PROCEEDING NUMBER		ACTION
DATE TAKEN	PROGRAM: DO / BOFE	SOURCE: 1 / 2 / 3	IND. CODE
FIELD INVESTIGATION REFERRAL			
REFERRING OFFICE		DATE	

BEST AVAILABLE COPY

YOUR NAME	SOCIAL SECURITY NO.	NO. TAX EXEMPTIONS
Karen B. Livados	573 96 0266	0
YOUR ADDRESS — NUMBER AND STREET, APARTMENT OR SPACE NO., CITY, ZIP CODE	HOME PHONE NO.	WORK PHONE NO.
40 Parkhaven Ct. Vallejo Ca. 94591	(707) 643 7022	(707) 554 8035
KIND OF WORK DONE (OCCUPATION)	DATE OF HIRE	CALIFORNIA DRIVER'S LICENSE NO. / DATE OF BIRTH
grocery clerk	4-19-73	E0502073 / 4-25-54
WORK DONE AT — NUMBER AND STREET, CITY, COUNTY, ZIP CODE	PUBLIC WORKS PROJECT?	WAS YOUR JOB UNION?
Safeway #989 774 Adm. Call. Ln. Vallejo 94590	☐ YES ☒ NO	☒ YES ☐ NO

AGAINST

NAME OF BUSINESS	EMPLOYER'S NAME	
Safeway Stores Inc. #989	Safway Inc.	☐ BANKRUPTCY ☐ BUSINESS SOLD ☐ INSOLVENCY
ADDRESS OF BUSINESS		TELEPHONE NUMBER
774 Admiral Callagahan Ln. Vallejo Ca. 94590		(707) 554 8035
NAME OF PERSON IN CHARGE	TYPE OF BUSINESS	ESTIMATED NO. OF EMPLOYEES: 120 / MINORS EMPLOYED?
Shane Ryan	grocery	☒ YES ☐ NO

WAGES — CONDITIONS OF EMPLOYMENT

RATE OF PAY — PER HOUR, DAY, WEEK OR MONTH (SPECIFY)	PAID BY PIECE RATE?	DID YOU WORK SPLIT SHIFTS?
$ 13.78 hr.	☐ YES ☒ NO	☐ YES ☒ NO
TOTAL HOURS WORKED: PER DAY: 8 PER WEEK: 40	PAID OVERTIME? ☐ YES ☐ NO	4 DAY / 10 HOUR WORKWEEK? ☐ YES ☒ NO / IF YES, WRITTEN AGREEMENT? ☐ YES ☐ NO
ARE YOU STILL WORKING FOR THIS EMPLOYER? ☐ YES ☒ NO — ☒ QUIT ☐ DISCHARGED — ON WHAT DATE?	IF QUIT, DID YOU GIVE 72 HOURS NOTICE? ☐ YES ☐ NO	WERE YOU PAID AT TIME OF DISCHARGE? ☐ YES ☒ NO
HAVE YOU ASKED FOR YOUR WAGES? ☐ YES ☐ NO — IF YES, ON WHAT DATE? 1-2-90	CHARGED FOR SHORTAGES? ☐ YES ☒ NO	RECORD OF HOURS WORKED KEPT? ☒ YES ☐ NO
HOW WERE YOU PAID? ☒ BY CHECK ☐ IN CASH	GIVEN A DEDUCTION STATEMENT? ☒ YES ☐ NO	UNIFORM / TOOLS REQUIRED? ☒ YES ☐ NO / IF YES, FURNISHED BY EMPLOYER? ☒ YES ☐ NO
MEAL PERIOD: ☐ ON DUTY ☒ OFF DUTY	MEALS FURNISHED? ☐ YES ☒ NO — IF YES, WRITTEN AGREEMENT? ☐ YES ☐ NO	MEALS FURNISHED: ☐ BREAKFAST ☐ LUNCH ☐ DINNER
LODGING FURNISHED: ☐ INDIVIDUAL ROOM ☐ SHARED ROOM ☐ APARTMENT	RENTAL VALUE OF APT. TO PUBLIC $	CASH ADVANCES (IF ANY) $ 0

GROSS WAGES CLAIMED (Do Not Deduct Payroll Taxes)

FROM (DATE) 19	TO (DATE) 19	NUMBER OF HOURS, DAYS, WEEKS OR MONTHS CLAIMED (SPECIFY)
		24 hrs @ 13.78 125 vacation hrs @ 13.78
AT THE RATE OF — PER HOUR, DAY, WEEK OR MONTH (SPECIFY) $	SUB-TOTAL →	$ 2112.49
	MINUS TOTAL OF CASH OR CREDITS RECEIVED →	$ 2112.49
	AMOUNT DUE OR BALANCE CLAIMED →	$ penalties only.

BRIEF EXPLANATION OF ISSUES (Use Additional Sheet If Necessary)

I was terminated from employment on 1/2/90. At that time I requested all monies due me to date. Shane Ryan, Mgr, told me "I can't cut you any money, they will probably mail a check to your house, that's how Safeway does it." I subsequently did receive the check via mail to my home on 1/5/90. I am claiming penalties from 1/2/90 - 1/5/90.

I HEREBY CERTIFY, That this is a true statement to the best of my knowledge and belief. Unless action on this claim is taken in accordance with Section 98 of the Labor Code, I assign all wages and all penalties accruing because of their nonpayment, and all liens securing them, to the Labor Commissioner of the State of California to collect in accordance with law.

MY NAME MAY BE USED IN ANY INVESTIGATION. ☒ YES ☐ NO

(Signed) Karen B. Livados Date 1-9-90

Address. 40 Parkhaven Ct. Vallejo Ca. 94591

DEFENDANT'S POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S COUNTER MOTION FOR SUMMARY JUDGMENT
Filed April 30, 1990
[Caption Omitted in Printing]

* * *

[at pp. 3-6]

II. ARGUMENT

A. Plaintiff Has Failed To Establish That The State's Policy Interferes With Her Federal Rights Under The Labor Relations Act

* * *

1. Plaintiff Misstates DLSE Policy And The Operative Facts Of This Case And Thereby Confuses Her Analysis Of The Applicable Law

a. DLSE Policy Does Not Depend On One's Status As A Member Of A Union

Plaintiff expressly maintains that her "participation in a labor union, and her participation in collective bargaining through representation of that union" (Complaint, p. 6, ls. 15-19) was the "sole reason" for her denial of the investigatory, prosecutorial, and remedial resources of DLSE provided under the California Labor Code (Complaint, p. 2, ls. 3-7). Unfortunately, Plaintiff has improperly stated DLSE policy under California law.

Simply stated, DLSE policy is based on its lack of authority under California law to determine "claims involving any dispute concerning the *interpretation or application* of any collective bargaining agreement containing [such] an arbitration agreement." (California Labor Code Section 229) The California courts have affirmed the construction of Labor Code Section 229 as stating a policy prohibiting the Labor Commissioner from hearing and enforcing wage claims where there exists a collective bargaining agreement which contains an arbitration clause. *Plumbing, Heating and Piping Employers Council of Northern California* v. *Howard* (1975) 53

Cal.App.3d 828. Although the claimant in *Howard* was a member of a union, the court did not mention union status as an operative fact necessary for application of the provision when it stated:

> "[I]t is concluded that the Legislature in enacting section 229 sought to encourage the resolution of labor disputes covered by collective bargaining agreements via arbitration-grievance procedures contained therein, and therefore intended to prohibit the Labor Commissioner from assuming jurisdiction to enforce claims arising under the collective bargaining agreements. *Id.* at 834-835.

Consequently, DLSE's policy does not depend on one's status as a member of a union as alleged in the Verified Complaint and repeatedly argued in the motion for summary judgment. The policy is founded on the generally accepted premise under both federal and state law that arbitration is in the best interests of all parties. *Perry* v. *Thomas*, 482 U.S. 483, 489; 107 S.Ct. 2520, 2525 (1986).

* * *

The letter sent to Plaintiff by DLSE dated February 7, 1990 (attached to Livadas Affidavit as Exhibit B) specifically states the basis for the Commissioner's action regarding her claim and reveals that DLSE's action was taken pursuant to the above-stated policy and was made without regard to union membership.

The policy of the DLSE relies upon the presence or absence of an arbitration clause in a collective bargaining agreement. A collective bargaining agreement which does not contain an arbitration clause would offer no impediment to the exercise of the Labor Commissioner's jurisdiction. On the other hand a collective bargaining agreement which covers non-union workers in an open shop would preclude the Labor Commissioner from exercising jurisdiction *if* that collective bargaining agreement contains an arbitration clause.

Therefore, the DLSE policy properly stated and supported by the facts in the instant action, establish that DLSE's policy is not discriminatory on the basis alleged.

b. Plaintiff Has Not Established That She Has A Right Under California Law To A Determination By The Labor Commissioner

Plaintiff essentially maintains that the denial of benefits and protections by DLSE which, Plaintiff alleges, were available under the California Labor Code [Section 203 penalties for late payment of wages upon discharge from employment] constitutes an interference with federally protected rights. (Pl. Mem. of P&A in Supp. of S.J., p.6) However, Plaintiff has not established how she can be entitled to an adjudication of her claim for penalty wages by the Commissioner in the first instance *in view of* the applicable provisions in California Labor §229 and the *Howard* case which constitute *state* laws that specifically deprive the Commissioner of jurisdiction to hear and enforce claims where there exists a collective bargaining agreement containing an arbitration clause.

Thus, if, as the *Howard* case holds, state law prevents the Commissioner from assuming jurisdiction in cases where there exists a collective bargaining agreement containing an arbitration clause, how could DLSE's policy based on that law deprive Plaintiff of benefits and protections under California law, let alone further interfere with federally protected activities under the NLRA?

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KAREN LIVADAS,
Plaintiff,
v.
LLOYD W. AUBRY, JR., in his official capacity as Labor Commissioner for the State of California,
Defendant.

NO. C 90 0468 TEH

ORDER

This matter comes before the Court on plaintiff's motion for summary judgement and defendant's cross motion for summary judgement. After carefully reviewing the parties' arguments, the Court has decided to CANCEL oral argument and DENY plaintiff's motion and DENY defendant's motion for the reasons set forth below.

FACTUAL BACKGROUND

Plaintiff seeks declaratory and injunctive relief for the California Division of Labor Standards Enforcement's alleged policy of discriminating against union members in administering the state wage and hour law. Defendant affirmatively alleges, among other defenses, that the terms of plaintiff's employment at Safeway are governed by a collective bargaining agreement which contains a mandatory and binding arbitration clause, and that the Division properly investigated and dismissed plaintiff's claim on the grounds that the Commissioner was precluded from interpreting or applying the terms of the collective bargaining agreement to determine damages allegedly due to plaintiff.

DISCUSSION

1. *Standard for Summary Judgement*

Summary judgement is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgement as a matter of law. *Jung* v. *FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); Fed. R. Civ. P. 56(c). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1976). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Id.* at 2511 (citations omitted). In ruling on a summary judgement motion, a court must view all facts and draw all inferences in the light most favorable to the nonmoving party. *Poller* v. *CBS, Inc.*, 368 U.S. 464 (1962).

2. *Disputed Material Facts*

The parties are in dispute as to numerous material facts, namely, whether; (1) plaintiff requested all pay due her by her employer at the date of her termination from her Manager; (2) Safeway did not pay plaintiff due and payable wages until January 5, 1990; (3) any of the parties dispute the amount of plaintiff's final wage payment; (4) any of the parties initiated a grievance under the applicable collective bargaining agreement concerning the amount of plaintiff's final payment; (5) the collective bargaining agreement has a provision concerning the timeliness of wage payments to employees who are discharged; and (6) plaintiff attempted to file a claim on January 3 and January 8, 1990 at the Napa Office of the Division of Labor Standards Enforcement, and on both occasions was told that the DLSE could not handle her claim as long as she was a member of a union.

In light of the numerous material issues of fact in dispute, summary judgment for either party would be inappropriate at this time.

Accordingly, the Court HEREBY DENIES plaintiff's motion for summary judgement and also HEREBY DENIES defendant's cross motion for summary judgement.

IT IS SO ORDERED.

Dated: May 15, 1990

/s/ Thelton E. Henderson
JUDGE THELTON E. HENDERSON
United States District

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KAREN LIVADAS,
Plaintiff,
v.
LLOYD W. AUBRY, JR., in his official capacity as Labor Commissioner for the State of California,
Defendant.

NO. C 90 0468 TEH

ORDER

This matter comes before the Court on plaintiff's motion for reconsideration of the Court's May 15, 1990 Order denying plaintiff's motion for summary judgement and defendant's cross motion for summary judgement. After carefully reviewing the parties' arguments, the Court has decided to GRANT plaintiff's motion.

FACTUAL BACKGROUND

Plaintiff seeks declaratory and injunctive relief for the California Division of Labor Standards Enforcement's alleged policy of discriminating against union members in administering the state wage and hour law. Defendant affirmatively alleges, among other defenses, that the terms of plaintiff's employment at Safeway are governed by a collective bargaining agreement which contains a mandatory and binding arbitration clause, and that the Division properly investigated and dismissed plaintiff's claim on the grounds that the Commissioner was precluded from interpreting or applying the terms of the collective bargaining agreement to determine damages allegedly due to plaintiff.

On May 15, 1990, the Court issued an order denying the parties' cross motions for summary judgement on the basis

that there were six material factual issues in dispute. The Court listed the following facts as being in dispute whether: (1) plaintiff requested all pay due her by her employer at the date of her termination from her Manager; (2) Safeway did not pay plaintiff due and payable wages until January 5, 1990; (3) any of the parties dispute the amount of plaintiff's final wage payment; (4) any of the parties initiated a grievance under the applicable collective bargaining agreement concerning the amount of plaintiff's final payment; (5) the collective bargaining agreement has a provision concerning the timeliness of wage payments to employees who are discharged; and (6) plaintiff attempted to file a claim on January 3 and January 8, 1990 at the Napa Office of the Division of Labor Standards Enforcement ("DLSE"), and on both occasions was told that the DLSE could not handle her claim as long as she was a member of a union.

The Court's ruling was based largely on the pleadings and two documents submitted by plaintiff and defendant respectively in support of their motions: plaintiff's "Statement of Material Facts Not in Dispute," and defendant's "Response to Plaintiff's Statement of Material Facts Not in Dispute." The court gained crucial information as to the nature of the underlying facts in this action from the papers the parties filed in regard to the instant motion. This additional information has lead the Court to change its previous ruling on this matter as set forth below.

DISCUSSION

1. *Legal Standard for Summary Judgement*

Summary judgement is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgement as a matter of law. *Jung* v. *FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1976). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the

nonmoving party. Id. To oppose a motion for summary judgement on the grounds that there is a genuine issue of material fact in dispute a party ". . . may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e)

2. *Analysis*

a. *Facts 1–4*

In its motion for reconsideration, plaintiff contends that defendant's grounds for disputing Facts 1 - 4, general denials for lack of knowledge in his Answer, are not adequate to create a genuine issue for trial under Fed. R. Civ. P. 56(e). In response, defendant argues that its general denial surpasses the Rule 56(e) test. Defendant further asserts that plaintiff relies on "hearsay" to establish Facts 1 and 2 and this evidence is insufficient to establish the facts alleged.

Contrary to defendant's assertions, a close examination of defendant's Answer reveals that defendant's grounds for disputing Facts 1–4 do not surpass the Rule 56(e) threshold.

Furthermore, defendant's contention that the affidavits made and submitted by plaintiff are insufficient to establish the Facts 1 and 2, for the purposes of a summary judgement motion, is without merit. Plaintiff's affidavit reveals what facts plaintiff would testify to at trial. In regard to Facts 1 and 2, plaintiff would testify that on the date of her termination she requested all pay due her from her manager, and that she was not paid such wages on that date. Plaintiff has personal knowledge of these facts, and at this juncture, these facts do not appear to entail the establishment of any out-of-court statement admitted for the truth of the matter asserted. As with defendant's Rule 56(e) contention, defendant's hearsay argument is without merit.

b. *Fact 5*

The fifth fact listed by the Court was whether "the collective bargaining agreement has a provision concerning the

timeliness of wage payments to employees who are discharged." Plaintiff contends that, "the question relevant to Plaintiff's motion for summary judgement is whether Plaintiff's collective bargaining agreement contains the same provisions of California Labor Code Sections 201 and 203 that wage payments be made immediately to discharged employees, and that wage penalties be paid for late payment." Plaintiff further contends that this question is a question of law rather than fact, since the collective bargaining agreement is in front of the Court and its meaning is not ambiguous. *United States* v. *King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988); *International Union of Bricklayers, Local 20* v. *Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir. 1985).

Plaintiff's argument here as well as defendant's response has crystallized for the Court that Fact 5 does indeed present a question of law rather than fact. Defendant tries to counter plaintiff's contention by claiming that a union and employer may agree on a manner in which a contractual benefit may be paid and that the Collective Bargaining Agreement contains language, which although not exactly the same as Sections 201 and 203, reveals such an agreement between plaintiff's union and employer. In support of its contention defendant cites *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985). The dispute between the parties as to Fact 5 thus may be reduced as follows: plaintiff contends that her right to a timely wage payment and wage penalties derives from state labor law, not the CBA, whereas defendant contends that plaintiff's right to such wages and penalties, if indeed such a right exists, can only derive from the Collective Bargaining Agreement. Given that the Collective Bargaining Agreement is before the Court, the dispute over Fact 5 is a question of law, rather than fact and thus does not impede resolution of a motion for summary judgement.

c. *Fact 6*

In regard to the sixth fact, plaintiff contends that although the parties are in dispute over what Department of Labor

officials told plaintiff on January 3, 1990 and January 8, 1990, this dispute is immaterial to the resolution of the case. Plaintiff argues that plaintiff has established defendant's liability by submitting a letter from Deputy Labor Commissioner Aceves, which informs plaintiff that the Department refuses to proceed on her claim for penalties under the California Labor Code because she is covered by a collective bargaining agreement with an arbitration clause. (exhibit B, Livadas Affidavit). Consequently, plaintiff contends the veracity of Fact 6, whether the Department announced its policy reasons for refusing to process plaintiff's claim in the Napa office on January 3, or 8, is immaterial to the resolution of this case, since Deputy Commissioner Aceves' February 7, 1990 letter announced the questioned policy.

Defendant fails to effectively respond to plaintiff's materiality argument. Defendant does not address the materiality of Fact 6 to the resolution of the cross motions for summary judgement but instead states that since plaintiff has failed to identify the individuals to whom she allegedly spoke on her alleged visits to the Napa Office, Fact 6 remains in dispute. Plaintiff's argument in its motion for reconsideration, has convinced the Court that while Fact 6 is in dispute, its resolution is immaterial to the resolution of this suit.

CONCLUSION

Regarding the factual issues listed by the Court in its May 14, 1990 Order as being in dispute, the Court HEREBY finds as follows: Facts 1–4 are not genuinely in dispute; Fact 5 presents a question of law rather than fact; and Fact 6 is in dispute but immaterial to the resolution of this case. Accordingly, and good cause appearing, the Court HEREBY GRANTS plaintiff's motion for reconsideration. If the parties wish to have the Court consider their respective motions for summary judgement, they must re-file the motions pursuant to Local Rule 220.

IT IS SO ORDERED.

Dated: June 27, 1990

/s/ Thelton E. Henderson
JUDGE THELTON E. HENDERSON
United States District

DECLARATION OF JAMES H. CURRY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL
Filed November 9, 1990
[Caption omitted in printing]

I, JAMES H. CURRY, declare:

1. Lloyd Aubry, Jr., the named defendant in the above-entitled action was the Labor Commissioner for the State of California and Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, until his resignation in December, 1989, to return to the private practice of law.

2. I am the current Acting Labor Commissioner for the State of California and have been employed with the Division of Labor Standards Enforcement as Chief Deputy Labor Commissioner from April 1987 to August 1990 when I was appointed Acting Labor Commissioner.

3. Among my primary duties as Acting Labor Commissioner is to oversee implementation of policies and all enforcement activities of the Division of Labor Standards Enforcement.

4. I have reviewed the Order (Memorandum Opinion) filed on October 12, 1990 in the above action.

5. It is clear from the language in the Order that the Labor Commissioner is now required to enforce sections 201 and 203 of the California Labor Code *without* regard to any given claimant's coverage under a collective bargaining agreement having an arbitration clause.

6. The above-mentioned Order will have an enormous effect on the enforcement policies and practices of DLSE which since 1975 has been enjoined from hearing and enforcing claims for penalty wages under Labor Code Section 203 pursuant to the California Court of Appeal decision in *Plumbing, Heating and Piping Employers Council of Northern California* v. *Howard* 53 Cal.App.3d 826 (1976).

7. Initially, the Labor Commissioner is now in the untenable position of either being in violation of the California state

court injunction prohibiting the very action which the U.S. District Court enjoins, or be in violation of the U.S. District Court order which orders the Commissioner to hear the very claim the state court injunction precludes. In short, the Commissioner will be in violation of at least one order by doing nothing or by acting to comply with either order.

8. As a result of the Order rendered in this action, a problem now exists due to the fact that all Deputy Labor Commissioners who receive and/or adjudicate wage claims in 32 offices throughout California will now have to process claims previously not heard by the Labor Commissioner. The claims the Order requires to be accepted involve a working knowledge of federal labor and contract laws.

9. Since all collective bargaining agreements contain a wage provision and nearly all contain additional relevant provisions pertaining to worker classifications, vacation pay, termination, and discharge "for cause", a Deputy reviewing a claim under Labor Code Section 203 must to some extent review, interpret, and analyze these type of collective bargaining provisions to determine whether all wages have been paid as well as address such issues as the basis for termination which may render other CBA provisions and procedures relevant.

10. Additionally, since there is no single collective bargaining agreement governing all California union workers, each agreement will have to be reviewed on an individual basis in order to determine Section 203 penalty wages.

11. The Deputy Labor Commissioners in the field offices have no extensive experience or expertise in federal law, statutory or case law, which is necessary to construe and/or interpret provisions in collective bargaining agreements which are governed exclusively by federal law. Only two of the 38 Hearing Officers are attorneys.

12. Consequently, it will be necessary to determine the scope of additional educational training for all Deputies *statewide* in order to implement and comply with this Court's order at substantial expense in time and resources, all of which

will be necessary to insure effective, fair, and uniform implementation of any required modifications to DLSE's enforcement activities. Moreover, such action and public expense will be lost and not recoverable if the judgment and order is reversed on appeal.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 8, 1990, at San Francisco, California.

/s/ James H. Curry
JAMES H. CURRY
Acting Labor Commissioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN LIVADAS,
Plaintiff-Appellee,

vs.

LLOYD W. AUBRY, JR., in his official capacity as Labor Commissioner for the State of California
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of California
Hon. Thelton E. Henderson, Judge

APPELLANT'S OPENING BRIEF
Filed January 11, 1991

* * *

[at pp. 3-4]

III. STATEMENT OF ISSUES

1. Whether the District Court erred in ruling that Plaintiff-Appellee, as an individual, has a private right of action under 42 U.S.C. §1983 to vindicate her rights under the National Labor Relations Act (hereinafter "NLRA").

2. Whether the District Court erred in ruling that the State's policy which precludes enforcement action by the Labor Commissioner of claims under California Labor Code Sections 201 and 203 where there exists a collective bargaining

agreement containing an arbitration clause infringes upon Plaintiff-Appellee's NLRA-based right to work under a collective bargaining agreement containing an arbitration clause.

3. Whether the District Court erred in ruling that §301 of the LMRA did not preempt Plaintiff's state claim filed with the Labor Commissioner for recovery of penalty wages under California Labor Code Sections 201 and 203.

4. Whether Plaintiff-Appellee's claim of alleged late payment of wages upon discharge would have been subject to defenses raised by the employer which would have required an interpretation or application of the terms of the CBA.

5. Whether the District Court erred in ruling that the State's policy as mandated by a state court injunction is preempted by §§7 and 8 of the NLRA.

6. Whether the District Court erred in granting Plaintiff-Appellee summary judgment against Defendant-Appellant and denying Appellant's crossmotion for summary judgment.

7. Whether the District Court erred in granting Plaintiff-Appellee the injunctive relief granted.

8. Whether the District Court erred in awarding (conditional) damages under 42 U.S.C. §1983 against Defendant-Appellant.

APPELLANT'S REPLY BRIEF
Filed February 22, 1991
[Caption Omitted in Printing]

[at p. 1]

I. ARGUMENT

A. PLAINTIFF APPEARS TO MISUNDERSTAND THE POSITION OF THE COMMISSIONER IN REGARD TO ENFORCEMENT OF RIGHTS ARISING UNDER SECTION 7 OF THE N.L.R.A.

1. Commissioner's Enforcement Policy Is Not Based Upon Union Membership But Upon The Provisions Of The Collective Bargaining Agreement

Plaintiff continues to contend that the basis for the dismissal by the Labor Commissioner of Karen Livadas' claim for recovery of "waiting time penalties" for lack of jurisdiction was her membership in a union and her "loyalty to that chosen representative." As Commissioner has pointed out, however, the enforcement policy looks simply at whether there is a collective bargaining agreement and whether that contract contains an agreement to arbitrate. It is not necessary that a worker be a member of a union in order to be covered under the terms of a collective bargaining agreement. Further, it is not necessary that a collective bargaining agreement contain an arbitration clause.

Thus, the enforcement policy which Livadas attacks does not rely upon a determination of whether one does or does not belong to a union. The Labor Commissioner's enforcement policy, based as it is on state statutory and case law, simply reflects the long-standing federal and state policy to encourage arbitration.

* * *